United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,776

DONALD E. ANDERSON

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Columbia

Justin L. Edgerton

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Washington, D. C. 20005

Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court err in denying the motion to suppress all evidence obtained by the police subsequent to appellant's arrest:

   (a) Because of the serious doubt as to the legality of the arrest; and

   (b) The delay of 20 hours in charging appellant before the United States Commissioner?

2. As the principal issue of fact was the identification of the appellant, did the trial court err in denying appellant's requested instruction that the burden was on the Government to prove identification beyond a reasonable doubt?

I N D E X

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,776

DONALD E. ANDERSON

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a conviction on a two-count indictment, charging the crime of housebreaking under Count One (Title 22, sec. 1801, D. C. Code) and the crime of robbery under Count Two (Title 22, sec. 2901, D. C. Code), on which appellant was sentenced by Judge Sirica for three to ten years on Count One and four to fourteen years on Count Two, to run concurrently with the sentence imposed on Count One. By order of the District Court entered July 7, 1964, appellant was

authorized to proceed in this appeal without prepayment of costs. By order of this Court on August 4, 1964, the undersigned counsel was appointed to represent appellant herein. The jurisdiction of this Court is founded upon the provisions of Title 28, sec. 1291 of the United States Code.

STATEMENT OF THE CASE

During the evening of August 19, 1960, Samuel J. Cardia and his wife, Virginia, were robbed at gun point in the living room of their home in the District of Columbia of money in the amount of $743.00. This occurrence was described by Mr. Cardia (Tr. 17 - 21) and by Mrs. Cardia (Tr. 65 - 66). Later that evening both Mr. and Mrs. Cardia gave verbal descriptions of the robber to Detective Leonard G. Kragh of the Metropolitan Police. The basic description was of a white male, 30 to 35 years of age, 5 feet 7 or 8 inches in height, medium build, weighing about 140 pounds (Tr. 75). Both agreed that the robber was wearing dark sun glasses which concealed his eyes and most of the upper part of his face. They differed in the clothing worn. Mr. Cardia described a dark sports coat, with light pants (Tr. 21); Mrs. Cardia, a sport type jacket, beige or grayish in color, and definitely lighter than his pants which were on "the black side" (Tr. 70). Mr. Cardia described a beatnik type of false beard on the chin applied with mascara (Tr. 21, 33) and powder on the face (Tr. 34); Mrs. Cardia a dark, unshaven face, with "heavy 5 o'clock shadow" (Tr. 70). She could not say as to any make-up (Tr. 71).

The next day they tentatively identified three photographs at police headquarters as being similar to or "look alikes" of the suspect but of the three so identified two of the men were already in jail and the third was ruled out for other reasons (Tr. 81-82).

On September 9, 1960, at 1:30 p.m. appellant was arrested by Lt. William Friel of the Detective Bureau. The arresting officer had no warrant for the arrest and appellant committed no offense in his presence (Tr. 8 - 9). He testified that the arrest was made as a result of a telephone call to Sgt. Gray of the Robbery Squad who said that appellant was wanted on a charge of robbery based on an identification by one Pamela Mason from a photograph at headquarters (Tr. 9 - 11). Appellant was taken to the office of the Robbery Squad at headquarters and later the same day was identified by Pamela Mason from a lineup (Tr. 12). That same evening Mr. and Mrs. Cardia were summoned to headquarters and viewed a lineup comprising appellant and four other men, three of whom were police officers, only two of whom, including appellant, were of slight build of 140 pounds or less (Tr. 83, 84 and photograph, Gov't Exhibit 1) and none of whom were dressed alike.

The next morning, September 10, at 10:10 a.m., appellant was charged in both cases, i.e., Pamela Mason and the Cardias, before United States Commissioner Splain (although not in the record, the Commissioner's commitment order is identified as U. S. Commissioner Docket 13, Case 432).

Appellant was indicted for both offenses in a four-count indictment, charging housebreaking and robbery in each of the Mason and Cardia cases, and was subsequently convicted on all four counts. Upon appeal to this Court the convictions were summarily reversed, for reasons not important here, and the case was remanded to the District Court for retrial. The two counts against appellant involving the Pamela Mason offense were subsequently nolle prossed by the United States Attorney and this appeal now relates to the retrial of the remaining two counts of housebreaking and robbery involving the Cardia offense.

At the outset of this trial, appellant's attorney in the District Court (not the counsel appointed by this Court) advanced at the outset that there was a

contention that appellant was illegally arrested (Tr. 2). The testimony of Lt. Friel regarding the arrest was taken out of the presence of the jury (Tr. 7 - 12) and a motion to suppress all evidence obtained by the police, including the appellant's identification in the lineup, was argued (Tr. 14 - 15) and denied by Judge Sirica (Tr. 15). The motion to suppress was renewed at the close of all of the evidence and was again denied (Tr. 95).

The principle issue at the ensuing trial was the identification of the accused. The only testimony not having direct bearing on this question was the rather curious testimony of one Albert Mattera who testified regarding a conversation with appellant in which he quoted appellant as asking him, Mattera, to approach the complaining witness, Cardia, with the suggestion that, although appellant was not guilty of robbing him, that if Cardia would be willing not to prosecute appellant would see that Cardia was paid the sum of $743, the amount which Cardia had lost in the robbery (Tr. 55-65). It is submitted that this is not corroborative of the identification of appellant, because the alleged offer was coupled with appellant's flat assertion that he was not guilty. There was, therefore, no admission of appellant that could be used against him on the issue as to whether he was the one who had actually committed the offense.

The remaining evidence related to the issue of identification. There was no dispute regarding the facts of the robbery. Appellant exercised his constitutional prerogative and did not take the stand and there was no evidence offered in defendant's case. The more material evidence on the issue of identification is more specifically hereinafter referred to in the Argument.

At the close of all the evidence, counsel offered Defendant's request for instruction No. 1 (the text is in the record and was read into the Transcript at pages 114 and 115). Judge Sirica denied this instruction on the ground that the

substance of the request would be covered in the general charge, but with the further comment that if he granted the request it would be tantamount to granting a directed verdict of acquittal. At the conclusion of the charge the request was renewed for the instruction but was again denied. (Tr. 114 et seq.)

Appellant was convicted on both counts and the District Court allowed him to proceed with this appeal in forma pauperis.

STATEMENT OF POINTS

1. The Court erred in denying the motion to suppress all evidence as to events occurring subsequent to appellant's arrest, because:

   a. Under the circumstances of this case the arrest of appellant for an entirely separate offense was illegal and was no foundation for the identification of appellant by the complaining witnesses for this offense from a lineup during the period of illegal detention following such arrest.

   b. Under the circumstances of this case, the period of 20 hours which elapsed between appellant's arrest and his appearance before the United States Commissioner constituted unreasonable delay.

2. The Court erred in denying defendant's requested instruction No. 1 on the issue of identification.

SUMMARY OF ARGUMENT

Appellant was arrested at 1:30 p.m. on September 9, 1960, without a warrant and without the commission of any offense in the presence of the arresting officer. The arrest was made on the basis of information received by the arresting officer from a fellow police officer that appellant had been identified from a photograph by one Pamela Mason who had been robbed in an entirely separate

offense from that with which appellant is charged here. Appellant was then taken to the office of the Robbery Squad at police headquarters and later that day, September 9, was identified by Pamela Mason from a lineup. That same evening appellant was identified in another lineup by Mr. and Mrs. Cardia, the complaining witnesses in the case involved here. He was not charged until the following morning, September 10, at 10:10 a.m. before the United States Commissioner at which time he was held for both offenses, i.e., Pamela Mason and the Cardias.

Under these circumstances, there is grave doubt as to the legality of both the arrest and appellant's subsequent detention for 20 hours so far as the admissibility of the evidence obtained against him during this period of prolonged detention for the purposes of the prosecution of this case. The motion to suppress all evidence obtained by the police subsequent to the arrest was erroneously denied under these circumstances. While there is a meager record with respect to these facts, there is sufficient doubt raised as to prejudicial abridgement of appellant's rights that his conviction should be reversed and a new trial ordered in order that all of the facts can be adduced.

There is further error in the refusal of the trial court to grant the requested instruction (Defendant's No. 1) on the issue of identification. In view of the serious discrepancies appearing in the description of the offender by the complaining witnesses on the day of the robbery, and the circumstances surrounding the identification by appellant in the police lineup some 20 days later by these witnesses, appellant was entitled to have the attention of the jury specifically directed to the burden imposed on the Government to prove identification beyond a reasonable doubt as an essential element of the crime charged.

ARGUMENT

I. Under the circumstances of this case, was the arrest of the appellant illegal?

(Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 2, 7 - 15, 95.)

Lt. William Friel, Detective Bureau, Metropolitan Police, testified as to the circumstances of the arrest which he made at 1:30 p.m. on September 9, 1960. Lt. Friel testified that he had no warrant, and that no offense was committed in his presence (Tr. 9) and the arrest was made on information he obtained from Sgt. Gray that appellant was wanted on charges of robbery from one Pamela Mason, who had identified appellant by a photograph (Tr. 9). The charge involving Pamela Mason was not the same offense for which he was tried and convicted in this case. The alleged offense involving Pamela Mason was the subject of the first two counts of the original indictment, but this was an entirely separate occurrence and can not in any way relate to the offense charged here involving Mr. and Mrs. Cardia. Pursuant to the arrest, Lt. Friel testified that he took appellant to the robbery squad office (Tr. 10), and at headquarters that same day appellant was identified by Pamela Mason in a lineup. The record at police headquarters does not show for what charge he was booked. Up until the time of his identification by Pamela Mason there is nothing in the record to show any booking or charge involved in this separate offense against Mr. and Mrs. Cardia.

On these facts, counsel for appellant in the District Court made proper and timely motions to suppress everything that occurred subsequent to the arrest insofar as this offense is concerned, including the identification of the appellant made by Mr. and Mrs. Cardia on the evening of the same day, September 9, after appellant had been in custody for approximately six to seven hours.

Testimony on the question of the legality of the arrest, referred to above, was heard by the Court with the jury being excused, and the motion to suppress was argued and denied (Tr. 14 - 15). The motion was renewed at the close of all the evidence and was again denied (Tr. 95).

While the evidence in the record is meager, there seems to have been no proof whatever offered that Pamela Mason was a reliable and trustworthy individual, but even if she were, her identification of the appellant related to an entirely separate offense.

On the principles discussed by Judge Wright in Gatlin v. United States, 1963, ____ U.S. App. D.C. ____, 326 F. 2d 667, there would seem to be serious question that this arrest was made with probable cause, certainly, with respect to evidence obtained subsequent to the arrest, with reference to the charge involved in this case, which will be hereinafter more fully discussed under point II. While this arrest involves the problems incident to the administration of a large metropolitan police force, as discussed by Judge Burger in Williams v. United States, 1962, _____ U.S. App. D.C. _____, 308 F. 2d 326, under which it might be argued that Lt. Friel had the right to suspect, on the information communicated to him by his associate, that a crime had been committed, and that the appellant was the offender, the problem here is whether, under these circumstances, the arrest for one alleged crime constitutes probable cause for another and separate crime and likewise a proper foundation for the admissibility of evidence procured as the result of such arrest to use against appellant to convict him of the second and separate offense.

II. Under these circumstances, was there unreasonable delay in charging appellant before the United States Commissioner?

(Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 15, 22, 75, 95.)

As already stated, appellant was arrested on September 9, 1960, at 1:30 p.m. Although not introduced in evidence in the court below, appellant was ordered committed by United States Commissioner Splain in two cases of housebreaking and robbery, both the one involving Pamela Mason and the one involving Mr. and Mrs. Cardia, the next morning, September 10, at 10:10 a.m. (U. S. Commissioner Docket 13, Case 432). During this period of more than 20 hours appellant remained in custody and during the evening of September 9 was identified from a lineup at police headquarters by Mr. and Mrs. Cardia. The circumstances of this identification are developed to in the evidence (Tr. 21 - 23, 37, 74 - 75). An objective reading of the entire record would clearly demonstrate that without this identification by the complaining witnesses at this lineup there would have been no substantial evidence against the appellant.

Under the circumstances of the arrest, more fully discussed in Point I, and in view of the detention of more than 20 hours before appellant's hearing before the United States Commissioner, there is serious question as to the admissibility in evidence of everything which occurred at the lineup, under the principles enunciated by this Court and fully discussed in Bynum v. United States, 1959, 104 U. S. App. D.C. 368, 262 F. 2d 465; Gatlin v. United States, supra; Payne v. United States, 1961, 111 U.S. App. D.C. 94, 98, 294 F. 2d 723, 727, cert. den. 368 U.S. 883, 82 S. Ct. 131, 7 L. Ed. 2d 83.

III. Appellant was entitled to the requested instruction on the issue as to his identification.

(Appellant desires the Court to read the following pages of the reporter's transcript: Tr. 17 - 23, 31 - 41, 65 - 71, 72 - 87.)

It is submitted that there were serious discrepancies in the description of the defendant furnished the police by Mr. and Mrs. Cardia on the same evening that the offense was committed. For instance, Mr. Cardia described the man who broke into his home as wearing a dark sport coat with light pants with a "beatnik" beard painted on his chin with mascara (Tr. 21 and again at 33 - 35); while his wife, who admitted she saw the man for less than one minute (Tr. 69), described the individual to police officers as wearing dark trousers on the black side with a beige or lighter colored sport jacket (Tr. 70). She recalls no beatnik-type beard, but describes the man as having a heavy five o'clock shadow with a very dark unshaven face. Detective Sgt. Kragh of the Robbery Squad, who interviewed Mr. and Mrs. Cardia that same evening, repeated the description given to him as a white male, 30 to 35 years of age, 5'7" to 5'8" in height, of medium build, weighing about 140 pounds, black hair, thin face, with a small black beard running from ear to ear along the jaw line (Tr. 76), wearing dark colored suit pants (Tr. 77). Both Mr. and Mrs. Cardia testified that the man was wearing dark sun glasses which obscured his eyes and covered most of the upper part of his face.

Despite these discrepancies in description, Mr. and Mrs. Cardia said they had no difficulty in picking the appellant out of the lineup at headquarters on the evening of September 9, which was approximately 20 days after the occurrence. The circumstances surrounding the lineup, however, deserve close scrutiny.

Sgt. Kragh testified there were five men in the lineup, including the appellant, three of them police officers (Tr. 82 - 84). Only two others besides the appellant could fairly be considered of being medium build. Appellant apparently was the only person in the lineup having thin features or a thin face. An examination of the photographs shows that he was the only one poorly dressed (Gov't Exhibit I), and it is submitted that it was not difficult for Mr. and Mrs. Cardia to select appellant as the only probable suspect out of a lineup so constituted.

Further damage thrown on the identification is the fact that Sgt. Kragh testified that Mr. and Mrs. Cardia made tentative identifications of three photographs at police headquarters on the morning following the robbery as being persons very similar "or look alikes". It turned out that two of the photographs so identified were of men already in jail and the third one was ruled out for other causes (Tr. 81 - 82). Under all of these circumstances, counsel for appellant requested the Court to instruct the jury as follows:

> "In this case there has been evidence presented to you of an identification of the defendant by the complainant and his wife, as the person who was in their home on August 19, 1960, and committed the offenses charged in the indictment. The Court instructs you as a matter of law that, should you find from that evidence that the circumstances of that identification were not convincing beyond a reasonable doubt, you should find the defendant Anderson not guilty." (Defendant's Instruction No. 1, Tr. 114-115)

Counsel for appellant below relied as authority for this instruction on the decision of this Court in McKenzie v. United States, 1942, 75 U.S. App. D.C. 270, 126 F. 2d 533. This contention appears to be well taken, although McKenzie involved a conviction for robbery and rape, in which the defendant heavily relied on the defense of alibi, the circumstances of the identification in McKenzie are not unlike those involved here.

There can be no doubt that the identity of the defendant is a part of the corpus delecti, and that the burden was on the Government to prove that the appellant was in fact the person who committed the offense as an essential element of the crime. Although Judge Sirica, in the general charge, repeated the same language that the burden was on the Government to prove each and every essential element of the crime beyond a reasonable doubt (Tr. 104 - 106), it is submitted that the appellant had the right to have the court instruct the jury on the law applicable to his defense, or the theory of his defense. Here, although the defense offered no testimony and appellant did not take the stand, the theory of the defense on the merits was obviously the failure of the Government to prove beyond a reasonable doubt the identity of the person who committed the robbery. As this Court said in McAffee v. United States, 1939, 70 U.S. App. D.C. 142, 105 F. 2d 21:

> "It is error not to give requested instructions if they correctly state the law and are warranted by the issues and the evidence, unless the substance of the requests is correctly, substantially and fairly covered by the general charge of the court or by other instructions of either party given by the court. * * *"

See, also, dissenting opinion of Chief Judge Bazelon in Nixon v. United States, 1962, _____ U.S. App. D.C. _____, 309 F. 2d 316.

It is submitted that the requested instruction does state the law because clearly the burden was on the Government to prove the identity of the appellant beyond a reasonable doubt, and appellant was entitled to have his theory of defense given proper emphasis by the court and not buried in the general charge.

CONCLUSION

In view of the serious question as to the legality of the appellant's arrest and the unreasonable period of delay in his commitment by the United States Commissioner, this case should be reversed and remanded for trial for a new trial to ascertain the evidence available on each of these questions. It is further submitted that the failure of the Court to specifically instruct the jury on the issue of the identification of the appellant, under the circumstances of this case, is in itself a sufficient ground for reversal.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,776

DONALD E. ANDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. When an instruction requested by a criminal defendant seeks to limit the jury in considering guilt to the circumstances of an identification by the complainant and his wife, need the instruction be given where it would remove from the case other probative evidence?

2. Where a citizen identifies a photograph of the thief who robbed her in her home, and the investigating policeman conveys this information to a second policeman by telephone, may the second officer act on the probable cause thus supplied and validly arrest the robber, in this case appellant?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,776

DONALD E. ANDERSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Convicted for housebreaking and robbery, appellant drew three to ten, and four to fourteen year sentences respectively, imposed on June 29, 1964 to run concurrently. 22 D.C.C. 1801, 2901. He had been arrested on September 19, 1960 (for another crime);[1] found guilty

[1] The other crime was a similar robbery of one Pamela Mason in her home, and led to two counts in the original indictment in this case. Conviction reversed, these counts of the indictment were severed prior to retrial, and dismissed following the instant conviction.

and sentenced on these same charges on May 19, 1961, the case had been reversed by this Court by order, Misc. No. 1664 dated September 26, 1962. The proceedings appealed in the instant case followed upon remand for new trial.

Unsuccessful pretrial attempt to prove his arrest illegal was based on appellant's evidence that the police officer who arrested him without a warrant acted solely on the basis of information from another policeman, but on no personal knowledge of his own. The complainant in another case (Pamela Mason) had identified appellant by his photograph as a culprit in her robbery case. At the time of the call, appellant was visiting at a house in the District which was "staked out" by the arresting officer and other police; appellant earlier had claimed to be living in Maryland (Tr. 8-9, 11-15). This was inadequate probable cause, was the claim, especially without a warrant.

Continuing the trial which commenced on June 9, 1964, appellant unequivocally was identified by his victims of August 19, 1960. Both recognized him as the armed intruder who had invaded their home and relieved Mr. Cardia of $743.00 (Tr. 23-24, 68). A barber by profession, Mr. Cardia disclaimed the effectiveness appellant's robbery disguise of powder and mascara in asserting a positive identification (Tr. 16, 18-21, 33-34). Mrs. Cardia testified she took flight when she saw that "this character" had her husband on the floor at gunpoint. She saw appellant for less than a minute, but his visage made a distinct impression on her (Tr. 66, 68-70).

Another barber, one Mattera, was called by the government to testify that appellant had asked him (Mattera) to intercede with Cardia in his behalf. Appellant had stated he was not guilty of the offense, he would willingly "return" or "give" $743 to Cardia if Cardia would not prosecute, a solution appellant preferred to that of being wrongly convicted (Tr. 55-64). Accordingly, Mattera did speak with Cardia about the matter (Tr. 54). The prosecution closed its case with testimony of a police

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,807

ROBERT GREGORY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
MARTIN R. HOFFMANN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Where evidence showed cruising police (having received report of a robbery in progress immediately followed by a flashed description that the two negro perpetrators, one in a light and one in a dark three-quarter length coat, were fleeing in a given direction) spotted a pair answering the description at a spot consistent with the direction reportedly taken, one of whom upon confrontation with the information received by the police immediately fled, did the district judge properly deny a motion to suppress the gun found after arrest had been effected?

2. Where government evidence showed a planned robbery by one armed and one unarmed bandit, in the course of which the second rogue took and held the gun for a time and then returned it to his confederate, was the issue of guilt of carrying a deadly weapon as to the "unarmed" robber properly submitted to the jury?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,807

ROBERT GREGORY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The indictment on which he was arraigned on April 3, 1964, charged appellant and one Colter with a February 16, 1964 housebreaking, robbery, assault with a dangerous weapon, and carrying a deadly weapon (CDW). 22 D.C. Code §§ 1801, 2901, 502 and 3204. Sentence imposed on July 10, 1964, prescribed confinement of from 18 to 84 months by dint of concurrent sentences for housebreaking, robbery and CDW convictions based on jury verdicts returned on May 22, 1964.

Trial

No great variance as to the salient facts was produced at trial in the proof adduced by prosecution and defense: Colter in company with his friend, appellant, had accosted a Mr. Brown at gunpoint in a laundromat (where Brown was caretaker) in northwest Washington shortly after 6:00 a.m. They sought money. Brown replied he had none there, though he had some at home, in his second-floor apartment across the street. A resident of the rear of the laundry banged on the wall to ask if everything was all right, and received affirmative reply. Appellant, Colter and Brown proceeded across the street, Brown calling as they went to the alarmed and still inquiring neighbor that he was indeed all right. Arriving at the apartment steps, his wife asked Brown who his companions were, thereafter becoming alarmed to the point of calling the police. Appellant and Colter came into possession of a number of pennies and some cufflinks which belonged to Brown. The duo then fled through the yard of Brown's building into an alley whereby they reached New Jersey and Q Streets, only to be apprehended by police within minutes of the transaction with Brown. The gun and pennies were recovered from Colter; additional pennies were retrieved from appellant, together with a knife.

In a number of additional details—as in the portent of the foregoing events—lay the conflicts which presented the jury's issues. Mr. and Mrs. Brown testified to a robbery by the two toughs who had interrupted Brown's early-morning offices of opening the laundromat to which he had proceeded directly from a night's sleep. Colter held an automatic pistol on Brown while appellant went through his pockets. This unavailing of their expressed desire, they repaired to Brown's house (Tr. 116-122, 137, 142-144, 149-151, 168, 174-178, 205-208, 223-224, 227-228). Appellant prevented Mrs. Brown—at knife point—from phoning police; he ransacked Mr. Brown's bureau wherein lay what Brown told them was the only money he had; Colter was in charge of the gun during

most of the foregoing, though appellant took and brandished it to emphasize several threats made prior to their departure.[1] Mrs. Brown observed them make off through the yard (Tr. 128-134, 151-152, 182-184, 187, 209-217, 228-230, 235-237). Police officers then described how the alert had been received by radio (Tr. 255-257, 259-260). Patrol wagon officers had spotted and hailed appellant and Colter, asking where they were going. Appellant bolted and ran, one officer in pursuit. The other officer engaged in a struggle for Colter's liberty that ended only when an officer from a cruiser came up to assist with handcuffs (Tr. 239-240, 261-264). Colter's detention in the wagon in five minutes' time (and after an audible thud) produced the gun, found on the floor between his feet, which was introduced in evidence at the close of the Government's case (Tr. 245-247, 265-266, 268-270). Appellant lost his footrace with his pursuer; a knife and some of the pennies were recovered from him (Tr. 242). Motions for acquittal were denied (Tr. 301-309).

In the defense case, appellant—a gambler by profession—described how he was merely helping his friend Colter collect some money taken from Colter by Brown[2] (Tr. 386-389, 391-392, 400, 404, 406). Upon confrontation

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[1] Brown described how appellant had taken the gun from Colter asking Colter what he should do, stating he ought to shoot the Browns and their children as well (Tr. 134). Mrs. Brown stated "Coleman" [Colter] had made the threat, that at one point appellant and Colter were passing the gun back and forth, and that when appellant asked Colter what he should do with them, he (appellant) held the gun (Tr. 215-216, 230-231).

[2] The nature of the debt was adduced by Colter, though knowledge of its origin was denied by appellant (Tr. 400). Brown had several hours earlier at the laundry sold Colter for $10.50 seven capsules purporting to be heroin wherewith Colter might satisfy his addict's craving for drugs (and appease encroaching withdrawal symptoms). When it developed the "caps" contained only milk sugar, Colter—after one unsuccessful attempt at settlement—borrowed a gun, enlisted appellant's assistance, and returned to demand a refund from Brown. Colter testified that since he had "had to scuffle and stole for" the $10.50 he was definitely going to get the money back from Brown (Tr. 311, 314-315, 320-322, 324-329, 346, 356, 358-359, 369-370).

and demand, however, Brown pulled a knife; Colter produced his gun; appellant secured the knife which Brown dropped; Brown agreed to go and get Colter the money from his home, which he did while Colter and appellant waited inside on the apartment house staircase. Brown soon rushed back out of the apartment, pressed the pennies and cufflinks on them, urging them to flee since his wife had called the police (Appellant, Tr. 392-396, 399-400, 412-415; Colter, Tr. 325, 329-336, 367, 379-380). When accosted by police, appellant fled only after the officer laid onto Colter, then seeking escape—he testified—because he was on parole and knew a trip to the precinct would mean return to prison (Tr. 397-398). The defense offering was inconsistent with the prosecution testimony that appellant had held the gun.

At the end of all the evidence, motions for acquittal were reasserted and again denied. Appellant's request for an instruction which would require a not-guilty return to the CDW count if the jury found his possession of the pistol "fleeting or transitory" was refused by the trial court (Tr. 420, 433-441, 470-472).

Motion to Suppress

The pretrial motion to suppress the gun and coins had been denied. Police officer's testimony included that set forth *supra* (as part of the government's case) and described in detail the two radio calls at 6:22 and 6:23 a.m. The first alerted to the robbery then in progress at the Brown address; the second described the perpetrators as two negroes in three-quarter-length coats, one of which coats was dark, the other light. A police cruiser was directed to the scene. In the direction described as that of flight in the lookout, at New Jersey and Q Streets, appellant and Colter were sighted by a wagon crew who had volunteered answer to the call. Stopped, questioned and confronted with their similarity to the armed robbers, appellant broke and ran as the cruiser arrived, while Colter—immediately thereafter caught—fought until sub-

dued (Monaco, Tr. 5-11, 13-17, 20-21, 23-24, 38-46, 54-59; Johnson, Tr. 62-73, 75-77, 79-80, 83-88). Appellant did not formally join in the motion to suppress, though he participated to the extent of questioning witnesses (Tr. 5, 30, 33-35, 43, 50, 76-78, 81, 83-85, 88, 101). In arguing the motion, it was conceded that the police were entitled to stop the pair and question them (Tr. 91, 96). It was urged, however, that the radio information was too general in character to provide probable cause and that possession of the gun had not been shown; suggested in passing was the notion that the persons who furnished the original information to the police had not been proved reliable (Tr. 89-93, 96). The District Judge fully analyzed the facts of record in denying the motion. In his view, probable cause for Colter's arrest included appellant's flight and Colter's "objection" to restraint. He added that, in any case, adequate probable cause existed at the patrol wagon crew's first sight of the two on deserted streets that early Sunday morning (Tr. 106-112). This motion was renewed at trial in form of objection to admission of the evidence (Tr. 281).

Other information pertinent to arrest developed during the trial included disclosure that the inquisitive laundromat neighbor—Mr. Banks—who had twice queried his friend Brown if all was well, had been prompted to do so by hearing a demand for money. After calling to Brown in the street, he had expressed his opinion of the whole situation immediately by calling the police (Tr. 179-181, 189-190, 199-203). So too did Mrs. Brown—after the robbery—immediately notify the authorities and report the occurrence (Tr. 217, 236).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution of the United States, provides in pertinent part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . .

Title 22, District of Columbia Code, Section 105, provides:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

Title 22, District of Columbia Code, Section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

SUMMARY OF ARGUMENT

The radio information received by police, together with the circumstances of sighting appellant and his codefendant plus their subsequent antics required the action police immediately took in arresting them.

To question the sufficiency of evidence of appellant's guilt of CDW is frivolous, in view of evidence of his access to and actual use of the weapon during the robbery. Since the concurrent sentences were imposed on this and the other guilty counts, the question need not even be reached on this appeal.

ARGUMENT

I. Arrest yielding the gun was indisputably legal.

(See Tr. 5-11, 13-17, 20-21, 23-24, 30, 33-35, 38-46, 50, 54-59, 62-73, 75-81, 83-93, 96, 101, 106-112, 179-181, 189-190, 199-203, 217, 236, 281)

The trial court's detailed, patient and probing analysis of the evidence more than adequately dispels the notion the police were not properly and legally impelled to the arrest of Colter:[3] this appeal is frivolous (Tr. 106-112). *Bell* v. *United States*, 108 U.S. App. D.C. 169, 280 F.2d 717 (1960).

Appellant's plaint that failure to demonstrate the reliability of the "informer" whose information led to the police broadcasts suggests a novel stumbling-block to the exemplary police reaction demonstrated in the instant case. The distinction between an informer's disclosures and the outcry of a citizen victim of or witness to a crime should not so easily be put aside. Compare *Prysock* v. *United States*, No. 18,063, *aff'd by order*, January 17, 1964, and *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961), with *Contee* v. *United States*, 94 U.S. App. D.C. 297, 215 F.2d 324 (1954). The suggestion that a policeman may not safely act on police radio information in the instant case should be rejected out of hand.

But this question is not even in the case: the confirming circumstances of appellant and Colter's presence on the deserted scene within minutes of a report accurately describing them (itself following a separate alert to the rob-

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[3] Appellee takes no issue with appellant's argument that he has standing to litigate the legality of the arrest, though to his authorities might profitably be added *Rosencranz* v. *United States*, 334 F.2d 738 1st Cir. 1964), and *Schoeneman* v. *United States*, 115 U.S. App. D.C. 110, 111 n.5, 317 F.2d 173, 174 n.5 (1963). In view of the lack of merit in the issues he seeks to raise, appellee submits the case is ripe for disposition without reaching this jurisdictional issue. See, *e.g. Mitchell* v. *United States*, 103 U.S. App. D.C. 97, 254 F.2d 954 (1958).

bery) and their flight upon confrontation adequately confirmed the radio information, reliable or not. *Schoeneman* v. *United States*, *supra* at 115 n.14, 317 F.2d at 178 n.14; se *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949).

II. Abundant evidence proved appellant's guilt of carrying a deadly weapon.

(See Tr. 116-122, 128-134, 137, 142-144, 149-152, 157, 168, 174-178, 182-184, 187, 205-217, 223-224, 227-231, 235-237, 245-247, 265-266, 268-270)

As appellant correctly owns, only if he is successful in demonstrating infirmity in the probable cause sustaining the arrest can he avoid affirmance of conviction for CDW. *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). In view of the first argument of this brief, the point thus is truly academic, aside from its utter frivolity.[4] Moreover, even were the gun and police testimony thereto suppressed, the unconnected testimony of the complainants Brown as to the gun would preclude acquittal—the offense might again be tried.

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[4] There was ample evidence that appellant, at least at one point, had taken over the gun from Colter; this was ample predicate for the jury's verdict (Br. 33-34; Note 1, this brief, *supra*). See *Cooke* v. *United States*, 107 U.S. App. D.C. 223, 275 F.2d 887 (1960); *Wilson* v. *United States*, 91 U.S. App. D.C. 135, 198 F.2d 299 (1952); *cf. Bartley* v. *United States*, 115 U.S. App. D.C. 316, n. 3, 319 F.2d 717, n. 3 (1963); Annot., 43 A.L.R.2d 492, 499 (1955) ("carry" in weapon statutes universally is taken to mean "bear"). Similarly, this same evidence—together with the obvious implications of a joint robbery venture—would clearly allow the jury to find appellant aided and abetted Colter's undisputed carrying 22 D.C.C. 105; *Frend* v. *United States*, 69 App. D.C. 281, 282, 100 F.2d 691, 692, *cert. denied*, 306 U.S. 640 (1938).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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officer as to the photograph of the lineup which followed appellant's arrest, and in which the Cardias had testified they had identified appellant (Tr. 73-75).

The defense rested without adducing any evidence. A defense request was rejected which would require the jury to acquit if they found the "evidence presented to you about an identification of the defendant by the complainant and his wife" and "the circumstances of that identification were not convincing beyond a reasonable doubt" (Br. 11). The court's charge to the venire—in addition to definitions of the crimes charged—included instruction on presumption of innocence, burden of proof, reasonable doubt, and credibility of the witnesses (Tr. 102-114).

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

SUMMARY OF ARGUMENT

The instruction sought by appellant would have required the jury to acquit if they did not find the circumstances of the initial identification of appellant convincing beyond a reasonable doubt. But the jury was entitled to consider all the evidence in the case in resolving the issue of appellant's guilt. The instruction was not erroneously withheld.

Probable cause enjoyed by the police officer who telephoned information led to appellant's arrest was properly attributed to the arresting officer. Appellant's suggestion —made for the first time on this appeal—that the first officer did not have the requisite information on which to base an arrest is without merit.

ARGUMENT

I. Instruction on his theory of the case was not denied appellant; his requested instruction did not accurately state the law.

(See Tr. 8-9, 11-15, 16, 18-21, 23-24, 33-34, 54, 55-64, 66, 68-70, 73-75, 97-98, 102-115, 118-122)

Appellant concedes that the trial judge instructed the jury they must find the government proved the elements of the crimes beyond a reasonable doubt. His claim is that they were not fully instructed they must find appellant the perpetrator of the crime, in urging as error refusal to give a requested instruction purportedly designed to cure this deficiency.

The claim cannot survive a reading of the court's instructions, where the issues constantly put to the jury only in terms of what "the defendant" or "Donald E. Anderson" must be proved to have done beyond a reasonable doubt (Tr. 102-107). Reading the instructions as a whole, and in the context of the trial, it cannot be said that the jury was misled or left uninformed of their responsibilities. *Glasser* v. *United States*, 315 U.S. 60, 83 (1942); *United States* v. *Thayer*, 209 F.2d 534, 536 (7 Cir. 1954); *Graham* v. *United States*, 88 App. D.C. 129, 107 F.2d 87 (1950).

The instruction sought by appellant referred to the jury being presented "evidence . . . of an identification," and required acquittal if the jury had reasonable doubts "from that evidence" about "the circumstances of that identification" (Br. 11, Tr. 97-98, 114-115, 118-122). This in terms would have limited jury consideration of identification evidence to the identification made in the lineup. In view of the other evidence which went to the issue of appellant's identity as the robber—the courtroom identifications, and appellant's ill-disguised attempt to buy his way out of the conviction he confidently feared—the request was erroneous as a matter of law and need not have been given. *McAffee* v. *United States*, 70 App. D.C.

142, 105 F.2d 21 (1939); cf. *Burroughs* v. *United States*, 115 U.S. App. D.C. 6, 316 F.2d 657 (1963). While it may have been appellant's theory that but for the lineup identification, there could have been no identification at all, this was the stuff of an advocate's argument, not a judge's charge.

II. Appellant's arrest was not illegal

Appellant was arrested on telephoned information to the arresting officer that he (appellant) was wanted by police for a robbery. Appellant had been identified by Pamela Mason, the complainant in that case. He cannot seriously question that the knowledge of the police who telephoned this information about appellant was thereby imputed to the arresting officer. *Williams* v. *United States*, 113 U.S. App. D.C. 371, 308 F.2d 326 (1962); cf. *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958).

Appellant insists here that the reliability and trustworthiness of Pamela Mason were not adequately developed. In assessing probable cause, however, there is a great difference between the report of an informer (whose reliability must be established), and the complaint of a citizen asserting victimization by crime: the report of the latter alone, is usually enough to satisfy probable cause requirements, and did so in this case. *Prysock* v. *United States*, No. 18,063, *aff'd by order*, January 17, 1964; *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961). The arrest legal, the trial judge quite properly refused the motion to suppress evidence of identification in a lineup following arrest.[2]

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[2] The court below was never exposed claim now made that evidence of the earlier identifications should have been suppressed on grounds it was obtained during a preiod of unnecessary delay. F.R. Crim. P. 5a; *Mallory* v. *United States*, 354 U.S. 449 (1957). It cannot be raised on this appeal. *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962). Even on its merits, the claim would fail, since there is no indication that defendant's identifica-

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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tion in the lineup resulted from any testimonial statements made by him during a period of illegal detention. *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 357 fn. 9, 316 F.2d 354, 358 fn. 9 (1963).

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